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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1414

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL.,
Petitioners,

VERSUS

LAWRENCE MOCH, ET AL.,
Respondents.

PETITION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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Respondents pray that Writ of Certiorari be denied.

STATEMENT OF THE CASE

The East Baton Rouge Parish School Board consists of all white members. However, one black has served as a member of the East Baton Rouge Parish School Board having been appointed by the Governor to serve an unexpired term. When this black member ran for the seat, he was defeated by a white.

The East Baton Rouge Parish School Board has a history of discriminatory practices. Additional relief had to be sought in federal court to implement the desegregation of public schools. Further, the East Baton Rouge Parish School Board still maintains a school named after the Confederate General Robert E. Lee.

Black elected officials and community leaders voiced strong objections to the re-apportionment plan by the School Board at a meeting held at the School Board Office. However, no objection was lodged with the United States Attorney General's Office.

It is true that a white incumbent democratic member of the Legislature from East Baton Rouge was defeated in the General Election by a republican, but it should also be noted that this area contains a high percentage of registered republicans and this republican has won re-election each time.

REASON FOR REFUSING THE WRIT

The black population according to the census data is concentrated in three (3) areas, one of which is outside of the City of Baton Rouge.

This suit was filed more than two (2) years after the first suit for re-apportionment was dismissed. Further, it should be

noted that there has been two (2) elections under the School Board's apportionment plan since the dismissal of the first suit. A total of six (6) blacks have run for the School Board, all have lost. Four (4) ran in the 1972 School Board election, and two (2) ran in the 1974 School Board election. No black has ever been elected to the East Baton Rouge Parish School Board since reconstruction.

In the 1974 election during the second primary, a white candidate opposed a black candidate in the run-off. The black candidate had the active support of the Mayor-President of the City of Baton Rouge and East Baton Rouge Parish and the Governor of the State of Louisiana. The black candidate was defeated. Most significantly, the result showed the electorates voted along racial lines. The predominately black precincts voted heavily for the black candidate, but the heavily white majority effectively cancelled out those votes. Election returns by precincts were presented to the District Court accompanying the trial brief filed by plaintiffs-appellants. The City-Parish Council of East Baton Rouge Parish has been apportioned into single-member districts since 1972. The black candidate, Lawrence E. Moch, a plaintiff herein, lives in one of the single-member districts of the City-Parish Council. If the School Board had been divided into single-member districts, Lawrence E. Moch would have been elected to the School Board. Two (2) of the other four (4) black candidates in the 1972 election lead white candidates in the first primary, but were defeated in the second primary.

In the present suit it was also alleged that the School Board was racially gerrymanded, the voting practices and procedures of the State of Louisiana and the Parish of East Baton Rouge tend to compound and multiply the racially discriminatory effects of the multi-member districts, that LSA-R.S. 18:358 provided for a majority rather than a plurality requirement in the primary elections and the white majority in a multi-member

district thus effectively prohibits any black candidate from gaining election, the multi-member district in combination with the above mentioned procedure deny blacks of East Baton Rouge access to the political force or control over members of the School Board because the effect of their votes is cancelled out by well-established and hostile interest groups in other parts of the parish in which these areas are located. None of these factors were alleged in the first suit. It was impossible to allege factors pertaining to an election under the apportionment plan in the first suit because there was no election held before the filing of the first suit. Plaintiffs did not have an opportunity to present evidence during the first suit. *William v. Murdock*, 330 F.2d 745.

Some of the facts alleged in this suit could not have been alleged in the prior suit. Therefore, res judicata is not applicable to the new matters alleged. *Parker v. McKeithen*, 488 F.2d 553; *Ottomano v. U.S.*, 468 F.2d 269, cert. den., 383 U.S. 919; and *Peabody Coal Co. v. Erwin*, 326 F.Supp. 1005.

Neither res judicata nor collateral estoppel gives conclusive force to a prior adjudication on facts which are different from those involved in the subsequent action. *Moore's Federal Practice*, Vol. 1B 0.422(4). *Bourns, Inc. v. Allen-Bradley Co.*, 480 F.2d 123, cert. den., 414 U.S. 1094. These new factors present new issues. Therefore, these issues could not have been determined. *Rhodes v. Jones*, 351 F.2d 884, cert. den., 383 U.S. 919.

The cases of *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976), and *White v. Regester*, 412 U.S. 755 (1973), were not decided at the time of the filing of the first suit. The courts have vacated and reminded earlier ruling in view of new court decisions. *Wallace v. House*, 538 F.2d 1138, 5th Cir. (1976).

The Supreme Court has held that all citizens are entitled to equal opportunities to participate in the political process and to elect legislators of their choice. *McGill v. Gadsden County Commission*, 335 F.2d 277, 5th Cir., (1976).

Plaintiffs in a voting dilution case have the burden of showing that their group has been denied access to the political process equal to the access of other groups. *Chapman v. Meier*, 420 U.S. 1 (1975). In *Zimmerman v. McKeithen*, 485 F.2d 1297, 5th Cir. (1973), and *East Carroll Parish School Board v. Marshall*, supra, the test for setting standards that will control voting diluting cases was enunciated. Plaintiff must show where a majority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particular interest, a tenuous state policy underlined the preference for multi-member or at-large districts, or that the existence of past discrimination in general prelude the effective participation in the election system, a strong case of dilution is made. The fact of dilution is established from proof of the existence of an aggregate of these facts. The Supreme Court recently pronounced in *White v. Regester*, supra, however that all these facts need not be proven in order to obtain relief. The East Baton Rouge Parish School Board has a policy of favoring multi-member districts.

The courts have repeatedly held that the existence of past racial discrimination is relevent to a decision whether at-large electorate district unconstitutionally dilutes the voting strength of blacks. *Wallace v. House*, supra. In *Wallace v. House*, supra, the Fifth Circuit Court of Appeals held that the general rule is that single-member districts ought to be preferred. *Connor v. Finch*, 419 F.Supp. 1072, 1976 S.D. Miss.

It is true that the 1977 Legislature ordered this Board to re-apportion itself into single-member districts in time for the 1982 election based upon the 1980 federal census,

Act 122 of 1977. However, the Legislature can change or repeal this act at the next Legislature Session. Further, the act is subjected to judicial attack because of being special legislation which is prohibited under the State Constitution.

The Fifth Circuit Court of Appeals was correct when it held that if a change in law has occurred regarding the constitutionality of multi-member districts since the dismissal of the earlier cause of action against the School Board, an application of the traditional res judicata principle would cause manifest injustice, neither bar nor collateral estoppel would prelude the action.

CONCLUSION

We respectfully submit that for the foregoing reasons that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

Joseph A. Gladney pr m.a.s
JOSEPH A. GLADNEY

Walter C. Dumas pr m.a.s
WALTER C. DUMAS

CERTIFICATE OF SERVICE

We, Joseph A. Gladney and Walter C. Dumas, counsel for respondents, and Joseph A. Gladney, member of the Bar of the Supreme Court of the United States, do hereby certify that on this 23rd day of August, 1977, copies of the foregoing Petition for Writ of Certiorari have been served on the attorney for petitioner herein, Mr. John F. Ward, Quad 1, Suite C, 1111 South Foster Drive, Baton Rouge, Louisiana 70806, by mailing three (3) copies of same, postage prepaid, to him at his mentioned address.

Joseph A. Gladney pr m.a.s
JOSEPH A. GLADNEY

Walter C. Dumas pr m.a.s.
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